
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Lonnie Ray Wiseman – Petitioner,

vs.

Pattie Wachendorf, Warden;
Federal Bureau of Prisons, - Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Eighth Circuit erred in refusing to order the government to produce a writ of habeas corpus *ad prosequendum*—as the Tenth Circuit did in similar circumstances—when the government represented a writ existed, but did not provide the document to the court, and the existence of a writ is the most important factor in the question of primary jurisdiction?

(2) Whether the State of Arkansas waived primary custody by transferring an individual to federal custody without a writ of habeas corpus *ad prosequendum*, or alternatively, if a writ was issued, by allowing an individual to be “on loan” for several years?

(3) Whether the failure to appoint counsel before the district court in a case involving complex legal issues regarding primary custody and a complicated, unclear factual record requires reversal?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

- (1) *Wiseman v. Wachendorf and the Federal Bureau of Prisons*, 4:18-cv-333-RGE (S.D. Iowa) (civil proceedings), judgment entered May 30, 2019.
- (2) *Wiseman v. Wachendorf, Warden; Federal Bureau of Prisons*, 19-2393 (8th Cir.) (direct civil appeal), judgment entered January 5, 2021.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Lonnie Wiseman, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 19-2393, entered on January 5, 2021.

OPINION BELOW

On January 5, 2021, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is published and available at 984 F.3d 649. Mr. Wiseman filed a petition for rehearing *en banc* on February 19, 2021, and the Eighth Circuit Court of Appeals denied the petition on March 12, 2021.

JURISDICTION

The Court of Appeals entered its judgment on January 5, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

18 U.S.C. § 3585(a)

(a) Commencement of sentence.--A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

STATEMENT OF THE CASE

In 1994, Mr. Wiseman was in state of Idaho custody. (DCD 9, Ex. 1, p. 12; App'x 110).¹ On September 11, 1995, Mr. Wiseman escaped Idaho state custody with a federal inmate. *Id.* Mr. Wiseman committed a series of robberies in New Mexico and Arkansas. *Id.* While still on the run, on September 13, 1995, the District of Idaho indicted Mr. Wiseman on federal escape charges. (DCD 1, Ex. 4; App'x 38).

Mr. Wiseman was arrested by the state of Arkansas on November 29, 1995, for a state robbery charge. (DCD 9, Ex. 1 ¶¶ 93, 113; App'x 113, 120-21). On February 8, 1996, Mr. Wiseman was indicted in the District of New Mexico with federal charges relating to robberies committed in New Mexico. (DCD 9, Ex 3 p. 4; App'x 146). On April 9, 1996, Mr. Wiseman pleaded guilty to the state of Arkansas robbery charge and was sentenced to 360 months of imprisonment. (DCD 9, Ex. 4; App'x 164).

On April 18, 1996, the District of Idaho arrest warrant was executed for Mr. Wiseman's pending federal escape charge. (DCD 9, Ex. 5; App'x 165). A Rule 40 hearing was held in the Western District of Arkansas. (DCD 1, Ex. 1; App'x 24-28). The purpose of the Rule 40 hearing was to transfer Mr. Wiseman to the District of

¹ In this brief, the following abbreviations will be used:

“DCD” -- district court clerk's record, followed by docket entry and page number, where noted; and

App'x – 8th Circuit appendix, followed by page number.

Idaho to face federal escape charges. *Id.* In the “commitment to another district” order, it states to the U.S. Marshal:

You are hereby commanded to take custody of the above named defendant and to transport that defendant with a certified copy of this commitment forthwith to the district of offense as specified above and there deliver the defendant to the United States Marshal for that District or to some other officer authorized to receive the defendant, all proceedings required by Fed. R. Crim. P. 40 having been completed.

Id. The docket sheet for these proceedings does not state that a writ of habeas corpus was filed.

Mr. Wiseman was transferred to the District of Idaho. Mr. Wiseman pleaded guilty to the federal Idaho escape charge and was sentenced to one year of imprisonment. (DCD 9, Ex. 6; App’x 167-71). This term of imprisonment was ordered to run concurrent to his term of imprisonment for the Arkansas state robbery conviction. *Id.* The district court recommended that BOP “designate an institution within the purview of the Arkansas State Department of Corrections.” *Id.* Wiseman was designated to serve this term with the BOP. (DCD 1, Ex. 2, 3; App’x 29-36). The date the sentence imposed, according to BOP, was August 1, 1996. (DCD 9, Ex. 7; App’x 172). Wiseman was “released” for this offense on July 31, 1997. *Id.*

On September 19, 1996, Mr. Wiseman was transferred to the District of New Mexico to face the pending robbery related charges. (DCD 9, Ex. 16; App’x 215). The transfer was pursuant to a request from an Assistant United States Attorney from the District of New Mexico. *Id.* No writ of habeas corpus *ad prosequendum*

was filed and no Rule 40 proceeding was held. (DCD 1, Ex. 4; App'x 37-39). On November 7, 1996, the state of Kentucky filed a detainer request with the federal government for pending state charges. (DCD 9, Ex. 8; App'x 175).

As to his District of New Mexico charges, Mr. Wiseman was convicted on all counts after a jury trial and sentenced to 595 months of imprisonment. (DCD 9, Ex. 9; App'x 182). In his presentence investigation report for this case, it states his date of arrest is September 25, 1996, and that he was received on a writ of habeas corpus from the U.S. Marshal, [District of Idaho]. (DCD 9, Ex 1; App'x 99). Soon after his conviction, the state of Idaho filed a detainer with the federal government for pending state charges. (DCD 9, Ex. 8; App'x 175).

After his sentencing in the District of New Mexico, Mr. Wiseman was designated by the BOP to serve his sentence at USP Beaumont. (DCD 9, Ex. 10; App'x 187). He was then transported to USP Beaumont and arrived on September 11, 1997. (DCD 9, Ex. 8, 10; App'x 175-80, 187).

Just a few weeks later, Forest B. Kelly, an Assistant Inmate Systems Manager, wrote a letter to Chief Deputy Marshal Michael Blevins, indicating that Mr. Wiseman was wrongly designated to a federal institution. (DCD 9, Ex. 11; App'x 188-89). Kelly noted that Mr. Wiseman was “inadvertently designated to the United States Penitentiary at the Federal Correctional Complex, Beaumont, Texas, and has since arrived at his designated institution.” *Id.* Forest indicated that the BOP's position was that the “primary jurisdiction of Mr. Wiseman lies with the

state of Arkansas” and indicated that she was taking action to return Mr. Wiseman to Arkansas state custody. *Id.* She also asked the Marshal’s service to lodge detainers with the state of Arkansas. *Id.*

The letter does not mention a writ of habeas corpus *ad prosequendum*. *See id.* Instead, the letter simply states: “Although Mr. Wiseman was subject to the 30-year state sentence, on April 18, 1996, state authorities in Washington County, Arkansas, released Mr. Wiseman to federal authorities in the Western District of Arkansas.” *Id.* Despite this, according to the letter, BOP determined that primary jurisdiction was with Arkansas. *Id.*

On October 22, 1997, Mr. Wiseman was transferred to Arkansas state custody. Arkansas later lodged a detainer with the federal government. (DCD 1, Ex. 2; App’x 29-33).

Acting pro se, Mr. Wiseman filed a petition for writ of habeas corpus in the Southern District of Iowa, pursuant to 28 U.S.C. § 2241.² (DCD 1; App’x 1-22). In his petition, Mr. Wiseman asserted that his District of New Mexico federal sentence commenced on September 11, 1997, when he was designated by BOP to USP Beaumont and subsequently transferred to that institution. *Id.* He further asserted that his federal sentence had ran continuously from that date. *Id.* Mr. Wiseman asserted that before this transfer, Arkansas had waived primary jurisdiction and the federal government had primary jurisdiction. *Id.* He noted the

² Mr. Wiseman is currently in custody with the Iowa Department of Corrections as part of the Interstate Compact Agreement.

significant time he was in federal custody, the transfer between two federal districts without a hearing or writ, his transfer to serve his federal sentence, as well as other factors. *Id.* Mr. Wiseman requested appointed counsel. (DCD 2; App'x 78).

The district court denied Mr. Wiseman's request for appointed counsel. (DCD 4; App'x A. However, the court ordered the government to respond to the petition. *Id.* The court noted that the Tenth Circuit Court of Appeals had stated that Mr. Wiseman's circumstances were similar to those in *Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002), where the Tenth Circuit held that the defendant's federal sentence began to run when he was transferred to a BOP institution, and had run continuously from that date. *Id.*

The government resisted. (DCD 9; App'x 83-98). According to the government, while Rule 40 proceedings were held, Mr. Wiseman was brought to face federal charges on a "loan," pursuant to a writ of habeas corpus *ad prosequendum*. *Id.* The government argued that Arkansas never waived primary jurisdiction, and that Mr. Wiseman's transfer to the BOP institution was in error. *Id.*

As part of its resistance, the government filed several documents, including the declaration of Robin Teters, a Management Analyst with the Designation and Sentence Computation Center at Grand Prairie, Texas. (DCD 9, Ex. 16; App'x 212-18). In the declaration, Teters asserts that Mr. Wiseman was originally brought to federal court when a "Rule 40 initial appearance was conducted and pursuant to a

Writ of Habeas Corpus Ad prosequendum” *Id.* Teters then cites to exhibit 1 attached to Mr. Wiseman’s original petition, and exhibit 5 attached to the government’s response. *Id.* Mr. Wiseman’s exhibit 1 is the Rule 40 paperwork, indicating he was committed to another district, but not mentioning a writ. (DCD 1, Ex. 1; App’x 24-28). Government exhibit 5 is the docket sheet for the Rule 40 proceedings in the Western District of Arkansas, which does not mention the filing of a writ of habeas corpus *ad prosequendum*. (DCD 9, Ex. 5; App’x 165-66).

The district court denied relief. (DCD 11; App’x B). First, the court found that the length of time he was in federal custody did not extinguish Arkansas’s primary jurisdiction. *Id.* Second, the court held that the transfer to the District of New Mexico from the District of Idaho without a Rule 40 hearing or writ of habeas corpus did not extinguish that Arkansas had primary jurisdiction. *Id.*

Finally, the district court found that the designation and transfer to a federal prison did not extinguish Arkansas’s primary jurisdiction. *Id.* The court found *Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002), distinguishable. *Id.* In conclusion, the district court held that “Arkansas never relinquished primary jurisdiction over Mr. Wiseman. His federal sentence will begin to run when he has completed his sentence in Arkansas.” *Id.*

Mr. Wiseman appealed, and the Eighth Circuit Court of Appeals appointed counsel for the first time. On appeal, counsel noted that the record did not include a writ of habeas corpus *ad prosequendum*, and that the circumstances supported that

one was never issued. Mr. Wiseman challenged both the denial of the petition and his denial for appointed counsel.

The Eighth Circuit Court of Appeals affirmed. *Wiseman v. Wachendorf*, 984 F.3d 649 (8th Cir. 2021); *see also* App’x D. First, the circuit determined the district court’s finding that a writ of habeas corpus *ad prosequendum* was issued was not clearly erroneous. *Id.* at 653. The circuit refused to follow the Tenth Circuit’s decision in *Weekes* and order the government to produce the writ. *Id.* at 654. Because of the writ, the circuit determined that Mr. Wiseman was simply “on loan,” and Arkansas did not waive primary jurisdiction. *Id.* at 655. The circuit also held that the length of time Mr. Wiseman was in federal custody did not support a waiver. *Id.*

The circuit affirmed the denial of appointed counsel. *Id.* The circuit determined Mr. Wiseman’s access to legal authority was sufficient. *Id.*

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeal's decision presents important issues of federalism and has created a circuit split. As it stands, the decision allows the federal Bureau of Prisons to overrule the will of the State of Arkansas. The Bureau of Prison's actions will result in Mr. Wiseman serving thirty additional years of incarceration, based upon records that appear to be altered after the fact.

The Eighth Circuit's approach departed from the Tenth Circuit's approach under similar circumstances, and fails to ensure an accurate record. The most important factor in Mr. Wiseman's claim for federal sentencing credit was whether he was transferred to federal custody on a writ of habeas corpus *ad prosequendum*. After having the assistance of appointed counsel for the first time, Mr. Wiseman noted that no writ was ever filed in Arkansas or Idaho federal court at the time of his transfer from state to federal custody. The government never provided the writ to the district court during the § 2241 proceedings. On appeal, the government responded to this assertion by stating Mr. Wiseman could not prove a writ was not filed—yet declined to affirmatively state a writ was filed.

Under similar circumstances, the Tenth Circuit had ordered the government to produce the writ (which it was ultimately unable to do) in *Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002). The Eighth Circuit refused to follow *Weekes*, stating the appellate court was “not the proper forum for evidentiary proceedings” But whether a writ exists is not a question of probabilities for a factfinder. The writ was

either issued or it wasn't. The simplest solution that ensures fairness and accuracy within the court is to require the government to produce the writ, as the Tenth Circuit did. This Court recently reaffirmed that an appellate court should take action to ensure an accurate record, stating, "To be sure, if a defendant believes that particular information in the record is irrelevant or unreliable, she may urge the appellate court to discount that information." *Greer v. United States*, 141 S. Ct. 2090, 2098 (2021). The Eighth Circuit's refusal to ensure an accurate record is inconsistent with this principle.

Independent of the Eighth Circuit's refusal to exercise its power to order production of the writ, the Eighth Circuit's holding that a writ existed was erroneous. This factual finding assumes the federal district court at Mr. Wiseman's transfer proceedings violated a federal statute, which requires a writ to be filed, and also violated U.S. Supreme Court case law, which states a Rule 40 hearing is not held when a writ is filed. The finding also ignores an earlier BOP concession that a writ was not filed. Because Mr. Wiseman was transferred without a writ, his case is indistinguishable from the Tenth Circuit's decision in *Weekes*, which found the state had waived primary jurisdiction and the defendant was entitled to federal sentencing credit.

Next, even if the Eighth's holding that a writ was filed stands, the legal conclusion that the state of Arkansas did not waive primary jurisdiction is inconsistent with the decision of another circuit. The length of time Mr. Wiseman

was “on loan” to the federal system supports that the State of Arkansas waived primary jurisdiction.

Finally, the Eighth Circuit’s refusal to reverse for the failure to appoint counsel before the district court requires certiorari.

I. The Eighth Circuit’s Refusal to Order the Government to Produce the Writ of Habeas Corpus *Ad Prosequendum* conflicts with the Tenth Circuit’s decision in *Weekes*. Regardless, the circuit’s finding that a writ was issued is error.

The Eighth Circuit’s treatment of the dispute regarding the writ of habeas corpus *ad prosequendum* has created a circuit split. Mr. Wiseman’s assertion that a writ was not issued was not baseless. First, the record is clear that a writ was not filed before the Arkansas or Idaho federal district courts during the transfer proceedings. Under federal statute, if a writ was issued, it would be filed. *See* 28 U.S.C. § 2241 (stating that writs must be filed with the district court). No writ is shown on the docket sheets.

The docket sheets are clear, however, that a Rule 40 proceeding was held. “Rule 40 is not applicable to the transfer of a federal prisoner to another district to stand trial pursuant to a writ of habeas corpus *ad prosequendum*.” *United States v. Sawyers*, 963 F.2d 157, 162 (8th Cir. 1992); *see also Carbo v. United States*, 364 U.S. 611, 613 (1961); *Terlikowski v. United States*, 379 F.2d 501, 507 (8th Cir. 1967) (holding that a defendant who was in Illinois state custody was not entitled to a Rule 40 hearing to be brought to face charges in federal court in Minnesota, but instead all

that was necessary was a writ of habeas corpus *ad prosequendum*). This also supports that no writ was issued.

Finally, the BOP appears to have conceded that a writ was not issued. The BOP's letter stated that Arkansas wished to relinquish primary custody to the federal government. (DCD 9, Ex. 11; App'x 188-89). The BOP representative stated: "Although Mr. Wiseman was subject to the 30-year state sentence, on April 18, 1996, state authorities in Washington County, Arkansas, released Mr. Wiseman to federal authorities in the Western District of Arkansas." *Id.* If the State of Arkansas wished to relinquish primary jurisdiction, the federal government cannot overrule that decision. *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005) (noting that the decision whether to waive primary jurisdiction rests with the sovereign alone); see *Trowell v. Beeler*, 135 F. App'x 590, 594 (4th Cir. 2005) (acknowledging that a state may waive primary jurisdiction because they wish for a state sentence to run concurrently to a federal sentence). The decision of whether to loan someone is vested "solely to the discretion of the sovereignty making it," acting through "its representatives with the power to grant it." *Ponzi v. Fessenden*, 250 U.S. 254, 261 (1922).

When questioned on appeal about the existence of a writ, the government never *affirmatively* represented in its briefing that a writ was issued. The government used carefully selected words and phrases to avoid making that affirmative statement.

Instead, the government argues that Mr. Wiseman cannot prove that a writ *was not* issued.

Under similar circumstances, another Circuit has ordered the government to produce the writ. In *Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002), the government asserted that the defendant was in federal custody pursuant to a writ of habeas corpus *ad prosequendum*. However, the Tenth Circuit noted the government never submitted or filed this document. *Id.* at 1179-80. The Circuit ordered the government to produce the writ. *Id.* When pressed, the government then conceded that no writ existed. *Id.* To ensure that the government is not relying on a factually incorrect assertion, this Court could do the same.

Regardless, the circuit's finding that the evidence establishes a writ existed is erroneous for reasons discussed above. To find a writ existed—and to support its refusal to order the government to produce the writ—the circuit relied on three factors: (1) Mr. Wiseman's pro se "admission" that a writ existed, (2) Teter's affidavit, and (3) the U.S. Marshal Custody Report.

However, it appears Mr. Wiseman relied upon the Custody Report, which was altered after the fact, and Teter then relied upon Mr. Wiseman's statement. The circuit's decision does not address that this document appears to have been altered after the fact. The documents only mentioned a "RWHCAP" on 10/22/1997, which was after the Bureau of Prisons "discovered" the supposed erroneous designation. (DCD 9, Ex. 11; App'x 188-90). Nothing at the time of Mr. Wiseman's transfer to

Idaho—when the Rule 40 proceeding was held—indicates a writ was issued. Instead, the circumstances support that a writ was not issued. To find otherwise assumes that two federal district courts did not follow the law.

Because no writ was issued, Mr. Wiseman's circumstances are indistinguishable from *Weekes*, and he is entitled to sentencing credit. In *Weekes*, the defendant was originally arrested in Idaho state court. *Id.* at 301 F.3d at 1177. While the defendant's state case was pending, he was taken into federal court to face federal charges, without a writ. *Id.* Idaho eventually brought the defendant back to state court, pursuant to a state writ of habeas corpus *ad prosequendum*, for a probation violation hearing. *Id.* His state sentence was ordered to run concurrent to any pending federal criminal prosecution. *Id.* The defendant was returned to federal custody and sentenced to 188 months of imprisonment. *Id.*

After sentencing, the defendant was designated to a federal prison and transferred to begin his sentence. *Id.* A U.S. Marshals Service staff member realized that the defendant had not completed his state sentence, and because the federal judge was silent on whether the federal sentence ran concurrently or consecutively to the state sentence, the federal sentence must run consecutively. *Id.* The defendant was transferred back to Idaho to finish his state sentence. *Id.* at 1178.

The defendant asserted that his federal sentence began when he was transferred to the federal institution to begin his federal sentence, pursuant to 18 U.S.C. § 3585(a), and that his federal sentence continued to run from that date

because the federal government had primary jurisdiction. The government argued that his transfer to a federal institution was simply an error with no legal significance.

The Tenth Circuit agreed with the defendant and found that he was entitled to post-sentencing federal credit under § 3585(a). *Id.* at 1178-80. First, under the statute, an individual's sentence begins to run when transferred to a federal institution. *Id.* at 1178-80. Further, the court reasoned his sentence continued to run from that date because an individual cannot be required to serve a sentence in installments, and the federal government was not under a duty to transfer the defendant back to Idaho state custody because the federal government had primary jurisdiction. *Id.* at 1180. In support of this finding, the court noted that "Idaho allowed the United States to take exclusive physical custody of [the defendant] without presenting either a written request for temporary custody or a writ of habeas corpus *ad prosequendum*." *Id.* at 1182. Because of this, the Tenth Circuit "presumed, therefore, that both the United States and Idaho agreed to a permanent change in custody." *Id.* Further supporting that Idaho relinquished primary custody, Idaho had used a writ to regain custody of the defendant from the federal government. *Id.* Idaho also filed a detainer with the federal government, asking that he be returned to state custody after completion of his federal sentence. *Id.*

Like in *Weekes*, Mr. Wiseman was transferred from Arkansas state custody to federal custody without a writ. This indicates that Arkansas intended to relinquish

custody. Further, the federal government delivered Mr. Wiseman to the BOP for commencement of his federal sentence. Based upon the factors discussed above, this Court should find Arkansas waived primary jurisdiction just as the Tenth Circuit found Idaho had done and hold Mr. Wiseman is entitled to post-sentencing credit under 18 U.S.C. § 3585(a).

Even if the Eighth Circuit's holding that a writ exists stands, the finding that the State of Arkansas did not waive primary jurisdiction is inconsistent with the decisions of other circuits. A writ of habeas corpus does not authorize the sovereign to maintain the "loan" status of the defendant indefinitely. *Brown v. Perrill*, 28 F.3d 1073, 1075 (10th Cir. 1994).

For example, in *Brown*, the Tenth Circuit determined that a defendant's holding on a writ for over two years extended the scope of the writ, and transferred custody to the federal government. *Id.*; see also *Luther v. Vanyur*, 14 F. Supp. 2d 773, 778 (E.D. N.C. 1997) (finding that holding on a writ for over three years transferred it from state custody for federal charges). Here, Mr. Wiseman's "loan" status of over a year and a half weighs in support of a finding that Arkansas waived primary jurisdiction. (DCD 9, Ex. 5; App'x 165-66). The Eighth Circuit's finding that Arkansas did not waive primary jurisdiction is inconsistent with *Brown*.

II. The Eighth Circuit erred in refusing to reverse based upon the denial of appointed counsel.

"A district court may appoint counsel for § 2241 applicants if it 'determines that the interests of justice so require.'" *Battle v. Armontrout*, 902 F.2d 701, 702 (8th

Cir. 1990) (citing 18 U.S.C. § 3006A(a)(2)(B)). When determining whether the interests of justice require it, “the district court must decide whether the pro se litigant has presented a nonfrivolous claim and then whether the nature of the litigation will make the appointment of counsel of benefit to the litigant and to the court.” *Id.* “Several factors should influence the court’s decision, including the pro se litigant’s ability to investigate the facts and present claims and the complexity of the factual and legal issues.” *Id.*

As a threshold matter, both the Tenth Circuit Court of Appeals and the district court below determined that Mr. Wiseman’s claim was not frivolous. (DCD 4; App’x 80). The Tenth Circuit acknowledged the similarities between Mr. Wiseman’s claim and that in *Weekes v. Fleming*, 301 F.3d 1175 (10th Cir. 2002), as did the district court. *Id.*

Further the question of primary jurisdiction, just as a legal matter, is complex. The Eighth Circuit has limited case law on the question. Mr. Wiseman told the district court that he only had reliable access to Iowa, Eighth Circuit, and U.S. Supreme Court case law. (DCD 10, p. 9). His research time was limited due to prison policies. *Id.* In addition, the factual issues in this case are also especially complex. Mr. Wiseman’s multiple pending cases and the multiple transfers make this case more complicated than the standard § 2241 petition.

Mr. Wiseman’s incarceration hampered his ability to adequately investigate his claim and obtain the necessary paperwork. *See Battle*, 902 F.2d at 702 (finding a

defendant's incarceration puts him at a disadvantage when attempting to investigate a claim). Mr. Wiseman was required to rely on his wife to attempt to track down documents from the BOP. (DCD 1, Ex. 5; App'x 40). Mr. Wiseman's wife's affidavit makes clear that obtaining paperwork from the BOP is difficult, especially as a nonlawyer. (DCD 1, Ex. 5; App'x 40).

Overall, Mr. Wiseman's case presented an unclear record and complex legal issues. The Eighth Circuit's refusal to ensure an accurate record or that Mr. Wiseman was adequately represented has resulted in a miscarriage of justice—specifically, Mr. Wiseman serving thirty additional years of incarceration when not intended by the State of Arkansas.

CONCLUSION

For the foregoing reasons, Mr. Wiseman respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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